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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO RAFEAL TORRES,

Defendant and Appellant.

C065845

(Super. Ct. No. SF09232)

A jury found defendant Alfredo Rafael Torres not guilty of arson but found him guilty of the lesser included offense of unlawful burning of an inhabited structure along with several other crimes. The jury also found that he unlawfully and intentionally took, damaged, or destroyed property worth over \$200,000, within the meaning of Penal Code<sup>1</sup> section 12022.6. Defendant contends the section 12022.6 enhancement must be

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

stricken as inconsistent with his conviction on the underlying offense. We affirm.

#### BACKGROUND

On July 11, 2009, Surgit Singh and his wife closed their convenience store around 11:00 p.m. and went upstairs to the apartment in which they lived. Around 3:00 a.m., they were awakened by the sound of breaking glass. Singh went to investigate and saw a fire outside of the kitchen on the back wall of the building. The entire wall was on fire.

Singh ran out of the building and saw a man, later identified as defendant, standing near the fire. Singh asked defendant to call 911. Defendant said he did not have a phone and demanded Singh's car keys. Singh told his wife to run and they both ran away.

The Singhs ran to the nearby fire station but no one was there. As they ran back to the store, they saw a man on a bicycle and asked him to call 911. The man did not have a phone with him but said he would go home and call. As the Singhs got back to the store, they saw a taxi approaching, stopped it, and asked the driver to call 911, which he did. The bicyclist returned and said he had also called 911.

The firefighters arrived approximately 25 minutes after the Singhs discovered the fire. At this point, the structure was 50 percent involved. Singh saw defendant opening the door of the detached garage and try to open Singh's car, which was parked inside. Singh told the firefighter that there was someone in the backyard.

One of the firefighters approached defendant, who then had his head under the open hood of the car. When the firefighter told defendant to leave the garage and go to the front of the store, defendant responded, loudly, "'Fuck you. I will kill you.'" The firefighter said he did not care and repeated that defendant needed to go to the front of the store. To this, defendant replied, "'Fuck you. I did it. I will kill you.'" Defendant then swung a wrench at the firefighter. The firefighter turned and ran off.

When police officers arrived, the firefighters informed them that defendant was in the backyard refusing to leave and had threatened to kill one of the firefighters. As the officers ran to the backyard, they encountered defendant running toward them. The officers told defendant to approach them and defendant unleashed a barrage of obscene language at them and told them he was going to kill them. Defendant continued to swear as the officers apprehended him and placed him in the patrol car. Defendant then spit all over the inside of the car, so the officers removed him to place a spit shield on him. When they put defendant back in the patrol car, he kicked out the window. Defendant appeared to be acting delusional.

The fire was not completely extinguished until 11:00 a.m. The building and its contents were a total loss with an estimated replacement cost of \$985,000. The origin of the fire was determined to be inside the deck enclosure of the back wall of the building. The fire did not appear to be accidental and

was consistent with use of an open flame, such as a match or lighter, without the use of an accelerant.

When defendant was booked in the county jail, two Bic lighters were found in his possession. A blood sample was drawn which tested positive for a low level of methamphetamine. Defendant told officers he was hallucinating at the time of the fire and had been injecting methamphetamine earlier that day. Defendant had a drug problem and had also been prescribed lithium and Seroquel (psychiatric medications).

The jury found defendant not guilty of arson, but guilty of the lesser included offense of unlawful burning of an inhabited structure. The jury also found defendant guilty of assault with a deadly weapon, felony vandalism, and being under the influence of a controlled substance, and found that he unlawfully and intentionally took, damaged or destroyed property worth over \$200,000 (\$ 12022.6).

The trial court sentenced defendant to the midterm of three years for the unlawful burning, concurrent terms on the remaining counts, and a consecutive two years for damaging property worth over \$200,000.

#### DISCUSSION

The jury acquitted defendant of arson.<sup>2</sup> Section 452 (unlawfully causing a fire), of which defendant was found

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<sup>2</sup> "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (§ 451.)

guilty, provides in part: "A person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned, any structure, forest land or property."

"'Recklessly' [within the meaning of section 452] means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." (§ 450, subd. (f).)

The jury also found the allegation under section 12022.6, subdivision (a), true, which provides for enhanced punishment where a defendant "takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction." (§ 12022.6, subd. (a).)

Defendant contends that he cannot stand convicted of section 452 with a section 12022.6 enhancement. Defendant emphasizes the differences between the mental states of "reckless" and "intention." He then argues, relying in part on *In re Kent W.* (1986) 181 Cal.App.3d 721, 723-724, that the section 12022.6 enhancement must be stricken as "a logical impossibility" since it requires "intent to cause" damage and his offense was one of recklessness.

Defendant's reliance on *Kent* is misplaced. *Kent* holds that, because attempt crimes require specific intent, a

defendant cannot be found guilty of attempt to unlawfully set a fire. (*In re Kent, supra*, 181 Cal.App.3d at pp. 723-724.) In so holding, the court noted that, to have the specific intent necessary for such an attempt, one would have to both intend to cause a fire and intend to unintentionally cause burning of property. (*Ibid.*) Since it is impossible to intend an unintentional result, there can be no attempt to commit a violation of section 452. (*Kent*, at pp. 723-724.) The court in *Kent* was not presented with potentially inconsistent verdicts. The court addressed only whether attempt to unlawfully set a fire is a crime in California and concluded it is not. (*Id.* at p. 722.) "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

Here, the jury found defendant not guilty of arson but of the crime of unlawfully causing a fire (§ 452) -- a lesser included offense of arson. Unlawfully causing a fire requires a lesser mental state (reckless, as opposed to the willfulness and maliciousness required for arson). This, he argues, is a "logical impossibility." In other words, he argues the jury's verdicts on the arson, unlawfully causing a fire, and the enhancement are necessarily inconsistent.

Factual inconsistency between the jury's enhancement finding and a related substantive offense does not warrant reversal, as long as the guilty verdict is supported by substantial evidence. "[A]s a general rule, inherently inconsistent verdicts are allowed to stand." (*People v.*

*Lewis* (2001) 25 Cal.4th 610, 656.) "Section 954 provides that '[a]n acquittal of one or more counts shall not be deemed an acquittal of any other count.' Thus, a jury may properly return inconsistent verdicts on separate counts." (*People v. York* (1992) 11 Cal.App.4th 1506, 1510.) Section 954 is not limited to inconsistencies between "counts" -- it has also been applied to uphold inconsistent enhancement findings. (*People v. Brown* (1989) 212 Cal.App.3d 1409, 1421, disapproved on different grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10.)

"The concept of jury largesse is not governed by the legislative choice of language. The fact that the word 'enhancement' is used rather than 'offense' does not nullify the underlying rationale of refusing to invalidate an inconsistent jury verdict if it is otherwise supported by substantial evidence." (*People v. Lopez* (1982) 131 Cal.App.3d 565, 571.)

"When a jury renders inconsistent verdicts, 'it is unclear whose ox has been gored.' [Citation.] The jury may have been convinced of guilt but arrived at an inconsistent acquittal or not true finding 'through mistake, compromise, or lenity . . . .'" (*People v. Santamaria* (1994) 8 Cal.4th 903, 911, quoting *United States v. Powell* (1984) 469 U.S. 57, 65 [83 L.Ed.2d 461, 469].) "In other words, if the conviction is supported by substantial evidence, it is valid because the defendant 'had the benefit of the jury's compassion, rather than suffering a burden because of its passion . . . .'" (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656.) As stated in *People v. Amick* (1942) 20 Cal.2d 247, 252, "such inconsistent verdicts may

be caused not by the confusion but the mercy of the jury, of which the appellant can neither complain nor gain further advantage."

Defendant does not claim the section 12022.6 enhancement finding was not supported by substantial evidence. Thus, the jury's finding of not guilty on the arson charge, but instead finding defendant guilty of the lesser included offense of unlawfully causing a fire, yet still finding the section 12022.6 enhancement true, presents no cause for reversal.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.